Supreme Court of the United States

No.....

OCTOBER TERM, 1922

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,
Petitioners,

v.

INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

EDWARD F. MCCLENNEN,
For the Petitioners.

STATUTES.

	PAGES
Bankruptcy Act Sec. 14, U. S. Comp. Stats., Sec. 9598	4
Sec. 17, Comp. Stats., Sec. 9601	4, 6, 9

TABLE OF CASES.

	PAGES
Baltimore & Ohio *v.* State, 71 Md. 590	10
Bates *v.* Bodie, 245 U. S. 520	7
Beers *v.* Prouty & Co., 203 Mass. 254	10
Bluthenthal *v.* Jones, 208 U. S. 64, 66	6
Bullis *v.* O'Beirne, 195 U. S. 606, 619	9
Burlen *v.* Shannon, 99 Mass. 200	7
Brandenburg on Bankruptcy, 4th ed., Sec. 1559	9
Collier on Bankruptcy, 11th ed., pp. 432, 433	9
Conant *v.* Johnston, 165 Mass. 450	10
Crawford *v.* Burke, 195 U. S. 176, 186, 194	2, 6, 9
Crescent City Livestock Co. *v.* Butchers' Union Slaughter-house Co., 120 U. S. 141	2
Crook *v.* Rindskopf, 105 N. Y. 476	10
Doyle *v.* First Nat. Bank, 231 Fed. 649, 653	9
Edwards *v.* Columbia Amusement Co., 215 Mass. 125	7
Forsyth *v.* Vehmeyer, 177 U. S. 177	9
Foye *v.* Patch, 132 Mass. 105, 110	7
Franklin *v.* Monning Dry Goods Co., 217 Fed. 929 (C. C. A. 5th)	9
Friend *v.* Talcott, 228 U. S. 27	3, 6, 8
Gilpin *v.* Merchants Nat. Bank, 165 Fed. 607 (C. C. A. 3rd)	9
Hennequin *v.* Clews, 111 U. S. 676	9
Hyslop *v.* Boston & Maine R.R., 208 Mass. 362	10
Inhabitants of Wakefield *v.* Am. Surety Co., 209 Mass. 173	10
International Trust Co. *v.* Myers, 245 Fed. 110 (C. C. A. 1st)	9
Jaeger *v.* Kelley, 52 N. Y. 274	10

PAGES

Kreitlein *v.* Ferger, 238 U. S. 21, 27 6
Loveland on Bankruptcy, 4th ed., Sec. 760 9
Mercer *v.* Wright, 3 Wisc. 645 10
Merriam *v.* Whittemore, 5 Gray, 316, 317 7
Morris *v.* Talcott, 96 N. Y. 100 10
Morse *v.* Hill, 136 Mass. 60, 70 10
National Fndry & Pipe Wks. *v.* Oconto Water Supply Co., 183 U. S. 216, 233, 234 2
Neal *v.* Clark, 95 U. S. 704 9
Oklahoma *v.* Texas, 256 U. S. 70, 85 6
Peck *v.* Lowenbein, 178 Fed. 178 (C. C. A. 4th) 9
Phillips *v.* Gookin, 231 Mass. 250 10
Pollock *v.* Pollock, 71 N. Y. 137 10
Postal Telegraph Cable Co. *v.* Newport, 247 U. S. 464 7
Radford *v.* Myers, 231 U. S. 725, 730 ..... 1, 2, 7
Re Blumberg, 94 Fed. 476, 479 9
Remington on Bankruptcy, 2d ed., Sec. 2747 9
Ramsey *v.* Ryerson, 40 Fed. 739 10
Schall *v.* Camors, 250 Fed. 6, 251 U. S. 239, 251 6
Shoninger *v.* Day, 53 Mo. Appeals, 147 10
Southern Pacific R.R. Co. *v.* United States, 168 U. S. 1, 48–49 6
Tindle *v.* Birkett, 205 U. S. 183 ..... 6, 9
Troxell *v.* D. L. & W. R.R., 227 U. S. 434, 440 7
Wallace *v.* Berdell, 97 N. Y. 13, 21 10
White *v.* Ely, 234 Mass. 221 10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. No.

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,
Petitioners,

v.

INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are succinctly stated in the petition which this brief accompanies.

GROUNDS FOR THE WRIT.

The petitioners have a discharge in bankruptcy under the Bankruptcy Act of the United States and a judgment of a Court of the United States, rendered in a suit between the petitioners and the respondent, in which the issue was necessarily tried, that the petitioners have not made a false statement. The petitioners have the rights and the immunities under the Constitution and Statutes of the United States, which this discharge and this judgment give them. Of a similar question of estoppel by judgment of a United States Court, this Court in *Radford* v. *Myers*, 231 U. S. 725, 730, said:

> "Whether such effect was given as the former judgment required, presents a Federal question for determination. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233. To determine this issue we examine the judgment in the former case, the pleadings filed and the issues made, and, if necessary, to elucidate the matters decided, the opinion of the court which rendered the judgment. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, supra, 234, and previous cases in this court therein cited."

Accordingly, in *Radford* v. *Myers* this Court did not dismiss the Writ of Error, but on the contrary considered the merits of the question and affirmed the judgment of the State Court on its merits.

In *Crawford* v. *Burke*, 195 U. S. 176, 186, 194, this Court decided that whether the Supreme Court of the State had given proper effect to a discharge in bankruptcy in view of the circumstances under which the debt had been contracted, was a Federal question, and reversed the judgment of the State Court and gave judgment that the discharge was a bar.

In *Crescent City Livestock Co.* v. *Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, this Court held that the effect, of a decree of the Circuit Court of the United States granting a preliminary injunction to the Crescent Company, as probable cause for the injunction suit (notwithstanding the fact that the suit was held finally to be without merit), was a question arising under the Constitution and Laws of the United States (p. 146), and that the State Court in the subsequent suit at bar by the Butchers' Company against the Crescent Company for malicious prosecution in bringing the suit in the Circuit Court to obtain the injunction, had, by failing to give it that effect, deprived the Crescent Company of a privilege or immunity under the Constitution or Laws of the United States (pp. 146, 156, 158.)

This establishes that the incidental effect as well as the direct effect of a decision of a Court of the United States presents a federal question, and that the right of the prevailing party in that decision is a right or immunity under the Constitution and Statutes of the United States.

Friend v. *Talcott*, 228 U. S. 27, was deemed by this Court a proper case for the allowance of a Writ of Certiorari where it was wrongly claimed that the discharge in bankruptcy itself, regardless of the issue tried, was *res judicata* that the bankrupt had not made a false statement. The case at bar differs from *Friend* v. *Talcott* as hereinafter discussed, but as to the question of jurisdiction, it differs from it only in the greater public importance of the question now involved.

It is manifestly of public importance to know whether a discharge in bankruptcy and a decision of a United States Court on a particular question tried out between parties as a preliminary to granting the discharge, are binding upon the same parties on the same question in a suit in a State Court, subsequently brought. The decision of a State Court that such a decision of the United States Court is not binding, manifestly tends to bring the decision of the United States Court into contempt for inefficacy. It is of public importance that everyone should know that when he has successfully tried an issue in a Court of the United States, he has acquired a right to have effect given to that decision, when pertinent in any other Court.

That right the Massachusetts Court has denied the petitioners, as more fully appears in the discussion of the merits of the question hereinafter.

THE UNITED STATES HAD DECIDED, AFTER A TRIAL OF THE PARTICULAR ISSUE BETWEEN THE SAME PARTIES IN THE BANKRUPTCY COURT, THAT THE PETITIONERS' REPRESENTATIONS WERE NOT FALSE OR MADE WITH AN INTENTION TO DECEIVE; AND THAT DECISION CREATED AN ESTOPPEL IN THE PETITIONERS' FAVOR AGAINST THE TRIAL OF THAT ISSUE IN THE CASE AT BAR.

The petitioners with the consent of a majority of their creditors applied for a confirmation of a composition in the Bankruptcy Court and the consequent discharge in bankruptcy. This application would have been granted if no objection had been made. The respondent could have remained silent and could have brought suit subsequently against the petitioners in which the respondent could have avoided the discharge in bankruptcy as a bar if the respondent could show that the petitioners' liability to the respondent was for obtaining property by false pretences or false representations. The respondent chose not to do this, but on the contrary, to try out the issue in the Bankruptcy Court. This proceeding on the respondent's part, if it had been successful, would have been a bar to the confirmation of the composition.

The Bankruptcy Act, Sec. 14 (c), U. S. Comp. Stats., Sec. 9598, provides that "the confirmation of a composition shall discharge the bankrupt from all his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Sec. 17 (2), Comp. Stats., Sec. 9601, provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as . . . (2) are liabilities for obtaining property by false pretences or false representations. . . ."

Sec. 14(b) provides that "the judge shall hear the application for a discharge. . . . and discharge the applicant, unless he has. . . . (3) obtained money or property on credit, upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person. . . ."

It will be noted that in order to prevent a discharge, the false representation must have been in writing, and must have been made to the person or his representative from whom the credit is obtained, but that the discharge, when granted, may be avoided by the creditor if there was a false representation although not in writing and not made directly to the creditor or his representative. This makes a possibility that the issues on a trial of objections to a discharge may differ from the issues on a trial to avoid the discharge; but there is no difference with respect to falsity, because if the statement was in writing and was made directly to the creditor, then if it was false it not only avoids a discharge under Sec. 17, but it also prevents a discharge (Sec. 14.)

In the case at bar, and in the case in the Bankruptcy Court, the only issue tried (and that issue was tried), was whether the statement was false in the sense in which that word is used in the Bankruptcy Act. It was undisputed in both Courts, that the statement had been made, that it was in writing, that it was made directly to the respondent, that it was material, and that credit was obtained. The Bankruptcy Court found all the facts needful for refusing to confirm the composition, except the fact that the statement was false. The judgment of that Court — both of the District Court and of the Circuit Court of Appeals — between these same parties was that the statement was not false. There is presented the unseemingliness that there are outstanding to-day, after trials on identical evidence between the same parties, two judgments, — the first, that of the United States Court, that the petitioners' statement was not false, and the second, that of the State Court that the petitioners' statement was false.

As applied to the present case, the language of the two sections of the Bankruptcy Act is identical. "Materially false statement," in Section 14 does not differ from "false pretences" or "false representations" in Section 17.

The respondent's claim relied on in the State Court was actually proved and dividends in composition were received upon it.

It was a provable claim.

Schall v. *Camors*, 250 Fed. 6, 251 U. S. 239, 251.
Crawford v. *Burke*, 195 U. S. 176, 187–193.
Tindle v. *Birkett*, 205 U. S. 183.
Friend v. *Talcott*, 228 U. S. 27, 38.
Kreitlein v. *Ferger*, 238 U. S. 21, 27.

Under Section 17 (2) the claim was barred unless the petitioners' statement was false. The judgment of the Bankruptcy Court was that it was not false.

"The general principle, applied in numerous decisions of this Court, and definitely accepted in *Southern Pacific R.R. Co.* v. *United States*, 168 U. S. 1, 48–49, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited (p. 49): 'This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.'"

Oklahoma v. *Texas*, 256 U. S. 70, 85.

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based."

Bluthenthal v. *Jones*, 208 U. S. 64, 66.

This principle of *res judicata* or estoppel by judgment, is one of the most firmly established.

Troxell v. *D. L. & W. R.R.*, 227 U. S. 434, 440.
Radford v. *Myers*, 231 U. S. 725.
Bates v. *Bodie*, 245 U. S. 520.
Postal Telegraph Cable Co. v. *Newport*, 247 U. S. 464.
Merriam v. *Whittemore*, 5 Gray, 316, 317.
Burlen v. *Shannon*, 99 Mass. 200.
Foye v. *Patch*, 132 Mass. 105, 110.
Edwards v. *Columbia Amusement Co.*, 215 Mass. 125.

The error which it is respectfully submitted the Massachusetts Court has committed, is not in wrongly deciding the petitioners' claim but in misconceiving what that claim was. This is shown by the action of the Court in treating the decision in *Friend* v. *Talcott*, 228 U. S. 27, as applicable. In that case, Talcott, the objecting creditor, failed to defeat the granting of the discharge because the statement relied on to defeat it was one made by Friend, the bankrupt, to a commercial agency and not to the creditor or his representative. Therefore the Bankruptcy Court ruled that inasmuch as no statement had been made to the creditor or his representative, it was immaterial whether the statement made to somebody else was false or not, and therefore, the question of the falsity of the statement was never tried. Under those circumstances, of course, the granting of the discharge did not establish that the statement was not false. In the subsequent suit brought by Talcott, he was not required to show, in order to avoid the discharge under Section 17, that the statement was made to himself or his representative, but could prevail by showing that the statement, made to the commercial agency intended for his reliance, was false. As the issue of the falsity of the statement had never been tried, there was nothing to prevent his showing this falsity. In other words, the issue which had been tried in the Bankruptcy Court was one of law, namely, whether a commercial agency could be said to be a "representative" under Section 14. The issue to be tried in the subsequent suit in the State Court was one of fact, namely, whether the statement was false. Clearly, under these circumstances, as pointed out by Chief Justice White, there was no "identity of cause between the two cases."

After pointing this out, he continues:

> "It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as *nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition.* On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition (p. 41). (Italics not in original.)

In short, in *Friend* v. *Talcott*, the issue of falsity or not had never been tried until it was tried in the subsequent action in the State Court. As there has been no decision that the statement was not false, there was nothing to operate by way of *res judicata* or estoppel. In the case at bar, the question of falsity or not was the issue which had been tried in the Bankruptcy Court, and it had been decided that the statement was not false. There is no reason, whatever, why the principle of estoppel by judgment does not apply. The respondent chose to try that issue in the Bankruptcy Court, and the petitioners prevailed upon it. They have a right to have full effect given to that decision of the United States Court and not to have it overridden by a subsequent decision of the State Court on the same evidence in a suit between the same parties. The District Court of the United States is at least of equal dignity with a jury in the Massachusetts Superior Court, and the Circuit Court of Appeals of the United States is of equal dignity with the Supreme Judicial Court of Massachusetts. As between the United States and the State Courts, the first decision and not the second, is the one which should prevail. There is peculiar reason for this in the case at bar. The falsity in issue was the falsity described in the United States Bankruptcy Act. The meaning of that word is to be determined finally not by the opinion of the State Court but by

the opinion of the United States Court. As determined by United States Courts, "false" — as the term is used in Section 17, Clause 2, of the Bankruptcy Act, excepting from the discharge, liabilities for obtaining property by false pretences or by false representations, — means intentionally, morally wrong and not simply untrue.

Collier on Bankruptcy, 11th edition, pp. 432, 433.
Remington on Bankruptcy, 2d edition, Sec. 2747.
Brandenburg on Bankruptcy, 4th edition, Sec. 1559.
Loveland on Bankruptcy, 4th edition, Sec. 760.

The same was true of the word "fraud" as long as that remained in the act before the amendment of 1903 struck out the requirement of a judgment before bankruptcy.

Bullis v. *O'Beirne*, 195 U. S. 606, 619.
Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Forsyth v. *Vehmeyer*, 177 U. S. 177.
Hennequin v. *Clews*, 111 U. S. 676.
Neal v. *Clark*, 95 U. S. 704.
Re Blumberg, 94 Fed. 476, 479.

The same is true of the word "false" as used in Section 14 (b), defining the grounds for refusing a discharge.

International Tr. Co. v. *Myers*, 245 Fed. 110 (C. C. A. 1st).
Doyle v. *First Nat. Bank*, 231 Fed. 649, 653.
Franklin v. *Monning Dry Goods Co.*, 217 Fed. 929 (C. C. A. 5th).
Peck v. *Lowenbein*, 176 Fed. 178 (C. C. A. 4th).
Gilpin v. *Merchants Nat. Bank*, 165 Fed. 607 (C. C. A. 3d).

In the case at bar, there was no evidence of intention to deceive, no evidence of moral turpitude, and the statement was not contrary to the fact. The statement does not understate the liabilities or overstate the assets. The defendants had accounts receivable amounting to $58,425.06. They do not state that these have not been pledged as collateral security. If they had left out the pledged accounts, then in

order to make their statement show the true balance of their assets, they would have been obliged to leave out the accounts payable to the Commercial Investment Trust for the money advanced. The statement would then have been false as an understatement of their liabilities. The only way in which they could have given the full information would have been to amplify the statement. Their net worth was not overstated. The decision of the Bankruptcy Court (245 Fed. 110), with respect to this — it is submitted — is correct. Everything stated is true. Not only was there no evidence of an intention to deceive, but on the contrary, the defendants testified that they believed that the statement was true and that they had no intention to deceive. Glass, the bookkeeper, called as the plaintiff's own witness, also so testified. There was no evidence to the contrary. Even if the jury had disbelieved their evidence, this negative would not amount to affirmative evidence to the contrary.

White v. *Ely*, 234 Mass. 221.
Phillips v. *Gookin*, 231 Mass. 250.
Pollock v. *Pollock*, 71 N. Y. 137.
Ramsey v. *Ryerson*, 40 Fed. 739.
Morris v. *Talcott*, 96 N. Y. 100.
Jaeger v. *Kelley*, 52 N. Y. 274.
Crook v. *Rindskopf*, 105 N. Y. 476.
Baltimore & Ohio v. *State*, 71 Md. 590.
Shoninger v. *Day*, 53 Mo. Appeals, 147.
Mercer v. *Wright*, 3 Wisc. 645.
Wallace v. *Berdell*, 97 N. Y. 13, 21.
Inhabitants of Wakefield v. *Am. Surety Co.*, 209Mass. 173.
Hyslop v. *Boston & Maine R.R.*, 208 Mass. 362.
Beers v. *Prouty & Co.*, 203 Mass. 254.
Conant v. *Johnston*, 165 Mass. 450.
Morse v. *Hill*, 136 Mass. 60, 70.

The petitioners assert that they have made no false statement. In support of that assertion they point not only to all the testimony in the case, but first and finally, to the decision of the United States Court, which establishes the fact conclusively between the parties to the case at bar. In the light

of that decision, the petitioners had the right to be relieved from trying the same issue again. It should not have been submitted to the jury. On this very issue, due effect has not been given to the decision of the District Court of the United States and of the Circuit Court of Appeals.

Respectfully submitted,

EDWARD F. McCLENNEN,
For the Petitioners.